IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

JUDGMENT

1. The Commissioner of Income Tax, Udaipur. **VS.** M/s Hindustan Zinc Ltd. Udaipur.

D.B.INCOME TAX APPEAL NO.29 / 1999

Under Section 260A of the Income Tax Act, 1961 against the order dated 24.3.99 passed by the Income Tax Appellate Tribunal, Jaipur Bench, Jaipur in ITA No. 1129/JP/94 for assessment year 1991-92.

2. The Commissioner of Income Tax, Udaipur. **VS.** M/s Hindustan Zinc Ltd. Udaipur.

D.B.INCOME TAX APPEAL NO.26 / 2000

Under Section 260A of the Income Tax Act, 1961 against the order dated 29.3.2000 passed by the Jodhpur Bench in ITA No. 1954/JP/93 for assessment year 1989-90.

3. The Commissioner of Income Tax, Udaipur. **VS.** M/s Hindustan Zinc Ltd. Udaipur.

D.B.INCOME TAX REFERENCE NO. 58 /1999

Against the order dated 8.2.99 passed by the Income Tax Appellate Tribunal, Jaipur Bench, Jaipur in R.A. No. 67/JDPR/1998 for assessment year 1990-91.

Date of judgment : 14th Dec., 2004

PRESENT

HON'BLE MR. JUSTICE RAJESH BALIA
HON'BLE MR. JUSTICE DINESH MAHESHWARI

Mr. K.K. Bissa for the appellant.
Mr. Vineet Kothari for the respondent.

BY THE COURT:- (PER HON'BLE MR. RAJESH BALIA), J.

These two appeals under Section 260A for assessment year 1989-90 and 1991-92 and IT Reference No.58/99 relating to the assessment year 1990-91 relates to the same controversy about the claim of the assessee to deduction of certain amount claimed by it as outright expenses incurred by it for the welfare of its employees under an obligation arising from the agreements between the assessee and its employees which were in operation during the relevant period and obligating the assessee to incur such expenses at the pains of punishment for non-compliance thereof under the Industrial Disputes Act.

However, the audit report submitted by the auditors of the company shows that there was auditors' note that the expenses are not eligible for deduction for computing the total taxable income of the assessee under Section 40 A (9) of the Income Tax Act, 1961. The said provision reads as under:-

> "40A(9) No deduction shall be allowed in respect of any sum paid by the assessee as an employer towards the setting up or formation of, or as contribution to, any fund, trust, company, association of persons, body of individuals, society registered under the

> Societies Registration Act, 1860 (21 of 1860), or other institution for any purpose, except where such sum is so paid, for the purposes and to the extent provided by or under clause (iv) or clause (v) of sub-section (1) of section 36, or as required by or under any other law for the time being in force.

While the Assessing Officer as well as the CIT (A) had not sustained the claim of the assessee, the Tribunal has allowed the claim of the assessee to deduction of said amounts as allowable expenditure laid down wholly and exclusively for the purpose of its business under Section 37 of the Act of 1961.

The expenses in question relates to amount paid towards activities carried under the welfare fund at the mine sites; to the staff club run by the members of the staff; to the Central Public School for securing admission and educational facilities for its employees and to subsidise the canteen.

It is true that the Tribunal has allowed the same as business expenditure vide its order for the assessment year 1990-91 by holding that payments are payable under the various agreement binding under the Industrial Disputes Act and the breach of which entail criminal prosecution and levy of punishment. However,

in our opinion, the finding recorded by the Tribunal falls short of requirement to determine the issue in its correct perspective.

So far as the order of Assessing Officer and CIT (Appeals) are concerned, notwithstanding the question raised by the Assessee that the amount claimed as deduction under Section 37 by him is not by way of contribution to any fund but such amount has been spent as expenses for labour welfare activities for securing and advancing its own business interest, both the authorities have not gone into the question and decided it in accordance with law but has merely disallowed the claim by referring to the auditors' note, which in our opinion, cannot be substituted for adjudication by the Assessing Officer and CIT (Appeals). It amounts to abdication of jurisdiction vested in these authorities to decide issues raised before it in the light of relevant law and material before it, merely on the opinion of the auditor. The opinion of audit may serve the purpose of drawing the attention of Assessing Officer to it, but it cannot alone be the foundation of assessment. None of the orders of the Assessing Officer for 3 years or CIT (Appeals) had even adverted to the real controversy and the question that had arisen for considering this issue.

The question whether a particular amount laid down by the assessee is by way of contribution to the funds envisaged under Section 40A(9) of the Act by the employer, or it amounts to expenses incurred wholly and exclusively for the purpose of his business by an entrepreneurs is of vital importance. All expenses incurred for the benefit of workman by entrepreneurs cannot be treated as contribution by the employer towards the various funds enumerated in Sec.40A(a) merely because of the volume of the amount. The expression used in Section 40A(9) is not `**the expenses incurred by the employer**' for welfare activities of its employees in any form but is confined to **'contribution made by the employer**' referred to the amount paid for setting up or formation, or as contribution to any fund, trust, company, association of persons, body of individuals, society registered under the Societies Registration Act, 1860 or any other institution for any purpose.

Therefore, the distinction which exists in law between the expenses and contribution to any fund was required to be decided before final conclusion is reached about invoking the provisions of sub-section (9) of Section 40A by the Authorities under the Income Tax Act.

The Tribunal too, in our opinion, has not applied its mind with reference to the aforesaid distinction by adverting to relevant law and has held all the activities referred by the Assessee as the employees' welfare activities, without examining the true nature of the amount laid down by the Assessee, to be as expenditure wholly and exclusively for business purposes. Whether the same was by way of contribution or by way of amount spent during the year in welfare activity, has not been examined.

As the nature of expenses referred to above by us suggests that all expenses are for different purposes, for different activities and some of them are for the activities directly carried out by the employees, same by the employer and employee jointly and some of the expenses have been out right payment to an another institution with whom no employee-employer relationship exists so far as the assessee is concerned for securing certain benefits to its employees. All these aspects have to be examined independently in respect of each expenditure.

In these circumstances, we deem it just and proper that the matter be remitted back to the Tribunal for deciding the issue about claim to

aforesaid deduction in question in these appeals afresh by giving a separate reasoned finding in respect of each of the separate item claimed by the assessee as deduction as expenses incurred and laid by him wholly and exclusively for its business and considered by the Assessing Authority to be contribution by the Assessee as employer to the various funds or entities stated under Section 40A(9) on the basis of auditor's note otherwise than what has been required under the law for the time being in force. This may also require consideration of the fact whether the settlements operating between the parties under the Industrial Disputes Act casting certain obligations on the entrepreneur as employer to be discharged by it every year annually can properly be termed as contribution required to be made under law when such obligations are enforcible and failure to comply entail pains of criminal consequences.

Some contours of question as to what may be considered expenses wholly incurred for one's business have been explained by this Court in the case of Rajasthan Spinning and Weaving Mills' case D.B. Income Tax Appeal No.15/1999 decided on 15.10.2003 which may be taken into consideration.

Accordingly, the appeals No.29/99 and

26/2000 are allowed. The judgment of the Tribunal in each case is set aside to the extent it holds the amount in question deductible under Section 37 and the case is sent back to the Tribunal for deciding the allowability of said amount as deductions afresh.

So also Income Tax Reference No.58/99 is concerned, we direct the Tribunal to submit a supplementary statement of case in accordance with finding reached by it about this issue under the aforesaid directions.

The appeal may be decided as far as possible within four months from the date of receipt of this order.

There shall be no orders as to costs in these appeals.

[DINESH MAHESHWARI], J. [RAJESH BALIA], J.

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